National Indian Gaming Commission

IN THE MATTER OF	)	
	)	NOV/CO 04-01
Coyote Valley Band of Pomo Indians	)	
	)	August 30, 2004
	)	
	)	

FINAL DECISION AND ORDER

Appeal to the National Indian Gaming Commission ("NIGC" or "Commission") from a Notice of Violation ("NOV") and Temporary Closure Order ("TCO") issued to the Coyote Valley Band of Pomo Indians ("Respondent" or "Tribe"). This appeal is brought pursuant to the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2701 *et. seq.*, and NIGC regulations, 25 C.F.R. Part 501, *et. seq.*

Appearances

Conley Schulte for the Respondent, Coyote Valley Band of Pomo Indians
John Hay for the Chairman, National Indian Gaming Commission

Presiding Official

Candida S. Steel, Office of Hearings and Appeals, U.S. Department of the Interior

DECISION AND ORDER

After careful and complete review of the agency record, pleadings filed by both parties, the Chairman's decision upon expedited review, and the Presiding Official's Recommended Decision, the Commission finds and orders that:

1. The NOV sets forth a permissible remedy to cure the violation. The measure selected by the Chairman to correct the violation was closure of the gaming operation. In an NOV, the Chairman has discretion to choose the "measure required to correct the violation" of the IGRA, as neither IGRA nor NIGC regulations prescribe certain remedies for specific violations.

2. The violation of IGRA in this instance was Class III gaming in the absence of an operative Tribal-State compact. In the NOV, the Chairman stated that the Tribe must cease all gaming to correct this continuing violation. Three days is a reasonable time to close the gaming operation and thereby cure the violation.

3. The reasonable time period for correction of a violation of IGRA set forth in an NOV begins to runs on the date the NOV is issued and served.

4. Because we find that closure is a permissible remedy and the proper remedy in this instance based on the record before us, we need not reach the question whether the enforcement action should be stayed pending the Tribe's attempts to obtain a compact.

5. The Chairman has discretion to order the temporary closure of an entire operation for a substantial violation of IGRA. Here, the Chairman acted within his discretion to order the closure of the entire operation. Based on the record before us, we are not persuaded by the Tribe's argument that it should be allowed to proceed with either Class II gaming or uncompacted Class III gaming.

6. "Good cause" does not supercede or overcome IGRA's requirement that Class III gaming is only authorized pursuant to an approved compact. Thus, based on the record before us, the closure order will not be rescinded pending approval of a compact between the Tribe and the State of California.

7. Based on the record before us, the Tribe's argument that equities weigh in its favor to justify its operation of Class III gaming without an operative compact is unpersuasive and does not supercede or prevail over IGRA's mandate that Class III gaming occur only pursuant to a compact that is in effect.

8. Accordingly, based on the record before us, closure of the casino was the appropriate remedy and, therefore, we make permanent the TCO.

9. If there is a change of relevant and material facts or circumstances which are not now part of the agency record, then the Tribe may petition the Commission to rescind the permanent closure order and grant the Tribe permission to resume Class II and/or Class III gaming .

STATUTORY, PROCEDURAL, AND FACTUAL BACKGROUND

The Coyote Valley Band of Pomo Indians of California ("Tribe") is a federally recognized Indian tribe with headquarters in Redwood Valley, California. *See* 67 Fed. Reg. 46328. The Chairman of the NIGC approved the Tribe's Gaming Ordinance on November 7, 1994. (Agency Record at Tab 1).

The Tribe and California have been involved in some form of compact negotiations since 1992. *In the Matter of The Coyote Valley Band of Pomo Indians*, NOV-04-01, CO-04-01 (July 29, 2004, Candida S. Steel, Presiding Official) at 2, Finding 2 ("Recommended Decision or Rec. Dec."). Despite failing to reach a compact, the Tribe opened the Shodaki casino while negotiations were on-going. *Id.* The Shodaki casino is on tribal lands located at 7751 North State Street, Redwood Valley, California. *See* (Agency Record at Tab 23); NOV-04-01 at 3(B). In November 1994, the Tribe began conducting Class III gaming without a Tribal-State compact, and continues to do so. *See In re Gaming Related Cases*, 331 F.3d 1094, 1109 n.6 (9th Cir. 2003).

In 1988, Congress enacted the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2701 *et seq.* IGRA "provides a comprehensive regulatory framework for gaming activities on Indian country which seeks to balance the interests of tribal governments, the states, and the federal government." *Seneca-Cayuga Tribe of Okla. v. Nat'l Indian Gaming Comm'n*, 327 F.3d 1019, 1023 (10th Cir. 2003), *cert. denied*, 2004 U.S. LEXIS 1651 (U.S. Mar. 1, 2004). IGRA authorized the creation of a three member National Indian Gaming Commission, consisting of a Chairman appointed by the President and two associate members (Commissioners) who are appointed by the Secretary of the Interior. 25 U.S.C. § 2704 (b)(1). The NIGC is charged with the administration and enforcement of the Act, and its powers include monitoring and shutting down unauthorized tribal games and promulgating regulations to implement IGRA. *Id.* at § 2706; *Seneca-Cayuga Tribe of Okla.*, 327 F.3d at 1023 (citing 25 U.S.C. §§ 2705-06, 2713). IGRA divides Indian gaming into three mutually exclusive categories: Classes I, II, and III. 25 U.S.C. § 2703. The three classes differ as to the extent of federal, tribal, and state oversight. *See* 25 U.S.C. § 2703(6), (7), and (8); *see also Seneca-Cayuga Tribe of Okla.*, 327 F.3d at 1023. Class III gaming is a residual category, in that all gaming activity other than Class I and II is Class III gaming. 25 U.S.C. § 2703 (8). Indian tribes have the right to regulate Class III gaming on their lands concurrently with a State and the NIGC only pursuant to an approved Tribal-State Compact that is in effect. *See* 25 U.S.C. § 2710 (d)(1); *see also* Recommended Decision at 3, Finding 3; *Seneca-Cayuga Tribe of Okla.*, 327 F.3d at 1024 (regulation of Class III gaming is shared by the tribes, the states, the NIGC, and the Department of Justice).

In 1999, California's Governor Gray Davis concluded compact negotiations with the Tribe, and a letter of intent to enter into the compact was signed by the Tribe on September 9, 1999. *See* Rec. Dec. at 3, Finding 5. The California legislature ratified compacts with numerous tribes, including this Tribe, Coyote Valley, on September 10, 1999. *Id.* (citing Chpt. 874, Statutes of 1999 (AB 1385, Batting); Cal. Gov't Code § 12012.25)). Governor Davis signed the legislation into law on October 8, 1999. *Id.* (citing Chpt. 874, Statutes of 1999 (AB 1385, Battin)).

Shortly thereafter, however, the Tribe declined to sign the compact, requesting further negotiations on several issues in the compact. *See* Rec. Dec. at 3, Finding 6. When the State refused to negotiate, the Tribe sued the State for failure to negotiate a compact in good faith. *Id.* The U.S. District Court stayed all civil enforcement actions, and the Tribe continued to operate its Class III gaming facility, despite the absence of a compact, while the litigation was pending. *Id.* at 3-4, Finding 6 (citing *United States v. 384 Electronic Gambling Devices*, 98-cw-1977 (N.D. Cal. Order of October 25, 2000)). The District Court ruled in favor of the State in the bad faith litigation, and the Ninth Circuit Court of Appeals affirmed. *See Indian Gaming Related Cases v. California*, 147 F. Supp. 2d 1011 (N.D. Cal. 2001), *aff'd*, 331 F.3d 1094 (9th Cir. 2003). On February 23, 2004, the U.S. Supreme Court denied the Tribe's petition for writ of certiorari, *In Re Indian Gaming Related Cases*, 124 S.Ct. 1412, 2004 LEXIS 1064 (U.S. Feb. 23, 2004).

On May 14, 2004, the Secretary of the U.S. Department of the Interior received a letter from a California State Deputy Attorney General stating that no tribal state compact existed with the Tribe because the State had not received proof of ratification by the Tribe by October 1999. *See* (Agency Record at Tab 14). Further, after the Tribe's bad faith litigation concluded, the Tribe pursued two strategies for obtaining a valid compact. *See* Rec. Dec. at 4, Finding 8. First, the 1999 compact was submitted to the Secretary of Interior for approval, and at her request, on June 1, 2004, was resubmitted for review pursuant to IGRA, 25 U.S.C. § 2710(d)(8). *Id.* The Tribe also recommenced negotiations with the State of California for a new compact, meeting with State representatives on at least four occasions between March and May 2004. *Id.*

On June 4, the Chairman issued Notice of Violation 04-01 to the Tribe, which gave it notice that it was in violation of the IGRA, NIGC regulations, and its own gaming ordinance

for operating Class III gaming devices and table games without a compact. *See* (Agency Record at Tab 23); NOV-04-01 at 3. Specifically, the NOV set forth that the Tribe was in violation of:

> 25 U.S.C. § 2710(d)(1)(C) – Class III gaming activities shall be lawful on Indian lands only if such activities are conducted in conformance with a Tribal-State compact.
>
> 25 C.F.R. § 573.6(a)(11) – Operation of Class III games in absence of a tribal-state compact is a substantial violation.
>
> Section 5 of the Coyote Valley Band of Pomo Indians Gaming ordinance – Class III gaming shall be conducted In accordance with any tribal-state compact between the Tribe and the State, or any alternative thereto as provided By IGRA.

Id. The NOV stated that to correct the continuing violation, the Tribe must "[c]ease all gaming activities by noon on Monday, June 7, 2004." *Id.* at 4.

When the casino remained open without a compact on June 7, the Chairman issued a TCO, requiring the Tribe to cease all gaming activities on the same date. *See* (Agency Record at Tab 31); CO-04-01 at 4. The Tribe complied with the TCO by ceasing all gaming on June 8, 2004. *See* Rec. Dec. at 5, Finding 10. On June 8, the Tribe requested that the Chairman conduct an expedited review of the TCO. *See* (Agency Record at Tab 33). In its petition, the Tribe argued that the TCO should be rescinded pending the Secretary's review of the 1999 compact between the Tribe and the State of California; that it be rescinded pending conclusion of negotiations on a new compact; and, in the alternative, that the closure order was too broad because it effectively prevents the Tribe from engaging in Classes I and II gaming, which do not require a compact. *Id.*; Rec. Dec. at 5, Finding 10.

On June 10, the Secretary disapproved the 1999 Compact filed on June 1 as invalid because the Tribe had failed to ratify it before the compact's October 9, 1999 deadline. *See* (Agency Record at Tab 38). In response, the Tribe brought suit regarding the Secretary's disapproval to the U.S. District Court for the Northern District of California pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 702-706, seeking declaratory and injunctive

relief. *See Coyote Valley Band of Pomo Indians v. Nat'l Indian Gaming Comm'n*, No. C-04-2337 JL (N.D. Cal. Filed June 14, 2004).[1]

Also on June 10, the Chairman issued a decision upon expedited review, denying the Tribe's request to rescind the TCO. *See* (Agency Record at Tab 39). The Chairman found that:

> (1) the Secretary had disapproved the Tribe's 1999 compact; consequently, the Tribe's argument that the TCO should be rescinded pending approval of that compact was moot;
>
> (2) the Tribe's bad faith litigation had concluded and the Tribe must comply with IGRA and cease gaming; and
>
> (3) IGRA authorized the closure of the entire gaming operation for the violation at issue and, in this case, closure was the proper remedy.

Id.

Further, on June 10, the Tribe filed an appeal with the Commission and requested a hearing on the NOV and TCO. *See* (Agency Record at Tab 40). The case was assigned to Candida S. Steel, Presiding Official at the U.S. Department of the Interior, Office of Hearings and Appeals, for a hearing and a recommended decision pursuant to 25 C.F.R. §§ 577.4 (a) and 577.14 (a).

On June 25, the U.S. District Court for the Northern District of California issued an order granting the Tribe's motion for a preliminary injunction, enjoining enforcement of the TCO for sixty (60) days until August 24, 2004. *See Coyote Valley Band of Pomo Indians v. Nat'l Indian Gaming Comm'n*, No. C-04-2337 JL (N.D. Cal. June 25, 2004) (order granting preliminary injunction). Thus, the NIGC and the Secretary were enjoined from prohibiting or taking any action to inhibit Class III gaming on the Tribe's reservation. *Id.* at 17. However, the preliminary injunction order explicitly stated that "this preliminary injunction does not affect the parties' obligations regarding review of the TCO."[2] *Id.*

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[1] The NIGC and the Chairman are also named defendants in this lawsuit, which asserts four claims: (1) that the NIGC and the Chairman failed to give the Tribe a reasonable time to correct the asserted violation of IGRA; (2) that the NIGC and the Chairman acted arbitrarily and capriciously by ordering the cessation of all gaming in order to correct the violation of the lack of a Class III compact; (3) that good cause exists to rescind the TCO; and (4) the Secretary's disapproval of the 1999 compact is arbitrary and capricious. *See Coyote Valley Band of Pomo Indians v. Nat'l Indian Gaming Comm'n*, No. C-04-2337 JL (N.D. Cal. Filed June 14, 2004).

[2] We are aware that on August 19, 2004, the Tribe and the Governor of the State of California reached agreement on a Tribal-State compact for Class III gaming, which has not yet been approved by the State legislature or Secretary of the Interior; and that on August 24, 2004, the U.S. District Court for the Northern

On July 7, a hearing on the Tribe's appeal of the NOV and TCO was held before the Presiding Official and the record was closed on July 16, 2004. *See* Rec. Dec. at 6, Finding 14. At the July 7 hearing, the parties stipulated that the Tribe was and is conducting Class III gaming at the Shodaki casino, and that no Tribal-State compact involving the Tribe and the State of California has been approved and published in the Federal Register. *See* Hearing Transcript at 4-5.

On July 29, the Presiding Official issued a Recommended Decision, concluding "that the NOV [for operating Class III gaming without a compact] be modified to require correction [of the violation] by submission of a current State-Tribal Class III compact to the Secretary of the Interior" and that the TCO "be suspended unless and until the Tribe fails to secure such a compact and its approvals" by September 3, 2004. *See* Rec. Dec. at 12-13.

Both parties filed objections to the Recommended Decision. *See* Chairman's Objections to the Presiding Official's Recommended Decision (August 4, 2004); Respondent's Objections to the Presiding Official's Recommended Decision (August 9, 2004).

DISCUSSION

Burden of Proof and Standard of Review

In administrative appeals of enforcement actions undertaken pursuant to 25 C.F.R. Part 573, the Chairman bears the burden of proof and the standard of review is preponderance of the evidence. *In the Matter of JPW Consultants*, NIGC 97-4; NIGC 98-8; (Nov. 13, 1998) (citing *In the Matter of Shingle Springs Band of Mewok Indians*, NIGC 97-1, Dec. 3, 1998).

Preponderance of the evidence is the degree of relevant evidence that a reasonable person, considering the record as whole, would accept as sufficient to find that a contested

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District of California granted the Tribe's request for an extension of the preliminary injunction, enjoining the NIGC from taking any action to inhibit Class III gaming on the Tribe's reservation pending the state's ratification and the federal register publication of the compact between the Tribe and the State of California. *See Coyote Valley Band of Pomo Indians v. Nat'l Indian Gaming Comm'n*, No. C-04-2337 JL (N.D. Cal. August 24, 2004) (Order Granting Miscellaneous Administrative Request for Extension of Preliminary Injunction). However, the District Court recognized that "this preliminary injunction does not affect the parties' obligations regarding review of the TCO". *Coyote Valley Band of Pomo Indians v. Nat'l Indian Gaming Comm'n*, No. C-04-2337 JL (N.D. Cal. June 25, 2004) (order granting preliminary injunction). The regulations require the Commission to issue a final decision, and we do so based on the record before us, which does not include evidence of or arguments regarding these subsequent facts. See 25 C.F.R. § 577.15.

fact is more likely to be true than untrue. *Id.* at 4. Since the violation alleged in the NOV as the basis for the TCO is conceded and not contested by the parties, we find the violation to be true for purposes of deciding the issues raised on appeal.

In an NOV, the Chairman has discretion to choose the remedy for a violation. The Chairman chose closure as the remedy. Three days is a reasonable time period to close a gaming operation.

The Tribe urges the Commission to find that the Tribe may cure the violation by obtaining an approved compact. *See* Supplemental Statement in Support of Coyote Valley Band of Pomo Indians' Appeal of NOV-04-01 and CO-04-01 ("Supp. Stmt.") (June 21, 2004) at 8. The Presiding Official agreed with the Tribe, recommending that because the Chairman issued the NOV and TCO separately, the Tribe may cure the violation by obtaining a compact. In the Recommended Decision, the Presiding Official found:

> If the NIGC feels that the violation is serious enough for the casino to be closed immediately, it can issue a simultaneous notice and closure order. But where, as here, the Chairman issued a Notice of Violation that includes a period of time within which the tribe may correct a violation, that notice implicitly accepts that securing of an approved compact is an acceptable alternative method of correction, and that closure is not the only recourse.

See Recommended Decision at 12. We disagree and reverse the finding of the Presiding Official.

Both IGRA and NIGC regulations provide the Chairman discretion to choose the remedy to correct a violation. IGRA provides that when the NIGC has reason to believe that a violation, which may result in permanent closure, exists, it must "provide the tribal operator or management contractor with a written complaint stating the acts or omissions which form the basis for such belief and the action or choice of action being considered by the NIGC." 25 U.S.C. § 2713(a)(3). IGRA also grants the Chairman separate power to order the temporary closure of a gaming operation. 25 U.S.C.§ 2713(b).

NIGC regulations further provide that this complaint, which the NIGC refers to as an NOV, must set forth the measures required to correct the violation. 25 C.F.R. § 573.3(b)(3). NIGC regulations also dictate that both failure to correct a violation within the time permitted in an NOV, and the conduct of Class III gaming without benefit of a compact are substantial violations that warrant closure. 25 C.F.R. §§ 573.6(a)(1) and (11). Thus, the regulations

show that the method of correction is within the Chairman's discretion. Taken together, the statute and regulations set forth an enforcement scheme under which the Chairman chooses the "measure" necessary to correct the violation, and provides notice in an NOV to the alleged violator that a violation exists and how to correct it. Neither IGRA nor the regulations dictate specific measures for particular violations. Thus, the Chairman had clear discretionary authority to select closure as the remedy.

In addition, we disagree with the Presiding Official's recommended finding that the NOV is superfluous when the remedy is closure if it is not simultaneously issued with the TCO. As set forth above, IGRA requires that the NIGC provide a "written complaint stating the acts or omissions which form the basis for the violation." 25 U.S.C. § 2713(a)(3). IGRA also grants the Chairman separate power to order the temporary closure of a gaming operation. 25 U.S.C. § 2713(b). Neither the statute nor the regulations provide that when closure is the Chairman's chosen remedy, he shall issue the NOV and TCO simultaneously.[3]

The Act contemplates two actions - notice and closure, which are not dependent on each other and need not be issued together. The Chairman may issue a NOV and a subsequent TCO or issue them simultaneously.[4] This decision is wholly within his discretion. The NOV, as the Presiding Official recognizes, puts a tribe on notice that the Chairman is aware of a violation, and provides for a reasonable time to correct the particular violation. *See* Rec. Dec. at 10. In essence, in cases involving substantial violations, it allows for voluntary compliance short of the more drastic action of the issuance of a TCO. Indeed, here the NOV provided the Tribe an opportunity to correct the violation short of a TCO, namely a voluntary cessation of the Class III operation. However, when the Tribe did not comply with the NOV, the Chairman issued the TCO. *See* Rec. Dec. at 5, Finding 10. Furthermore, the issuance of a TCO is distinct from that of a NOV in that the TCO creates a

[3] In our Commission Decision in *In the Matter of Santee Sioux Tribe of Nebraska*, NOV-96-01, CO-96-01 (July 31, 1996, Commission Decision) we issued an NOV for uncompacted Class III gaming, followed by a TCO. *Id.* at 2.

[4] For that matter, the Chairman may choose to issue a civil fine instead of or in addition to closure. See 25 U.S.C. 2713(a)(1) and 25 C.F.R. Part 575.

separate right to expedited review not created by the issuance of an NOV. *See* 25 C.F.R. §573.6(c)[5].

The Chairman relied on two distinct subsections of the NIGC closure regulation to support his action. (Agency Record at Tab 31); TCO-04-01 at 4 (A) and (B). Both of these subsections support the Chairman's decision to issue the TCO subsequent to the NOV. The first subsection provides that, "Simultaneously with or subsequently to the issuance of a [NOV] ...the Chairman may issue an order of temporary closure of all or part of an Indian gaming operation if ...a gaming operation operates Class III games in the absence of a tribal-state compact that is in effect..." 25 C.F.R. § 573.6(a)(11). This subsection makes clear that when the violation is uncompacted Class III gaming, a TCO may issue either after or at the same time as the NOV. Here, the Chairman followed this regulation when he issued the NOV first and the TCO second. To find that the NOV is superfluous ignores the "subsequently to" language of 25 C.F.R. §§ 573.6(a).

The Chairman also relied on section 573.6(a)(1)(i). This section has more general applicability, and provides that a closure order may issue if a tribe fails to correct any violation within the time permitted in a notice of violation. 25 C.F.R. § 573.6(a)(1)(i). Under this subsection of the closure regulation, an NOV and TCO could not issue concurrently because this subsection assumes that an NOV will issue, and that a TCO may issue some time later if the tribe fails to correct the violation. This process gives a tribe an opportunity to voluntarily correct a violation short of closure. Here, when the Tribe failed to close the casino in the time required by the NOV, the Chairman issued the TCO, an action well within his authority under the regulations.[6]

Moreover, case law provides that it is within an agency's discretion to fashion an appropriate sanction. In a case with strikingly similar facts, the Eighth Circuit Court of Appeals declined to find the National Credit Union Administration's (NCUA) choice of remedy arbitrary, capricious, or an abuse of discretion. *Oiciyapi Federal Credit Union v. National Credit Union Administration*, 936 F. 2d 1007 (8th Cir. 1991). The case involved

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[5] "Within seven (7) days after service of an order of temporary closure, the respondent may request, orally or in writing, informal expedited review by the Chairman." 25 C.F.R. § 573.6(c). The regulations provide a detailed procedure for the expedited review. 25 C.F.R. §§ 573.6(c)(1)-(3).

[6] We note that while the Chairman relied on both subsections of the closure regulation, he could have relied on one or the other alone.

multiple violations of the Federal Credit Union Act occurring at the Oiciyapi Federal Credit Union (Credit Union), a bank located on the Rosebud Indian reservation in Rosebud, South Dakota. *Id.* at 1008. Following the issuance of a warning letter with a date by which to correct the violations, and following several intervening years during which the violations continued, the NCUA issued a Notice of Intent to Suspend Charter and Place into Involuntary Liquidation. The Credit Union requested a hearing, which was held before an Administrative Law Judge (ALJ). The ALJ found that all but one of the violations existed, but recommended a different remedy than that set forth in the Notice of Intent. The ALJ recommended that the Credit Union's charter be suspended for sixty (60) days, or until the violations were remedied. He further recommended that if the Credit Union did not achieve compliance by the end of the sixty-day period, the charter be revoked.

The NCUA declined to adopt the ALJ's proposed remedy and instead suspended the Credit Union's charter indefinitely and liquidated the Credit Union. *Id.* On review, the Eighth Circuit Court of Appeals held that the remedy chosen by the NCUA was "within its statutory authority" in that the governing statute authorizes the NCUA to "suspend, revoke or liquidate a credit union...". *Id.* at 1012. The Eighth Circuit found that, while it may not have chosen the same remedy, the remedy the NCUA chose was within its statutory authority. *Id.* at 1009. Hence, the Eighth Circuit further concluded that while the ALJ's recommended decision becomes part of the record that goes to the NCUA, the NCUA renders the final agency action. *Id.*

The facts in *Oiciyapi* are remarkably similar to those at issue here. In *Oiciyapi,* the agency tried unsuccessfully to obtain voluntary compliance, and finally notified the Credit Union of its intent to liquidate it. Liquidation was a remedy available to the NCUA from among several provided for in its governing statute. *Id.* at 1012. Here, the Chairman tried unsuccessfully to obtain voluntary compliance and ultimately ordered closure of the casino, a remedy available to him under IGRA. In *Oiciyapi,* a hearing was held before an ALJ, a quasi-judicial officer similar to a Presiding Official. The ALJ recommended a remedy different from that chosen by the NCUA, much like the Presiding Official recommended a remedy different from that chosen by the Chairman in this matter. The *Oiciyapi* court upheld the NCUA's choice of remedy as wholly within its statutory authority and discretion. *Id.* at 1009. The same finding is warranted on the facts at issue here.

Furthermore, the U.S. Supreme Court has held that courts should not disturb an agency's choice of sanction unless it is either "unwarranted in law or...without justification in fact." *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 185-186 (1973). "Where Congress has entrusted an administrative agency with the responsibility of selecting the means of achieving the statutory policy the relation of remedy to policy is peculiarly a matter for administrative competence." *Id.*; *see also Wonsover v. Securites and Exchange Comm'n,* 205 F.3d 408, 416 (D.C. Cir. 2000) (citing *O'Leary v. SEC*, 424 F.2d 908, 912 (D.C. Cir. 1970) ("sanction fell within the spectrum of the Commission's statutory authority... and choosing a point on that spectrum is a determination left to the Commission.)); *Magic Valley Potato Shippers, Inc. v. Secretary of Agriculture*, 702 F.2d 840, 842 (9th Cir. 1983) ("The fashioning of an appropriate remedy is for the Secretary of Agriculture and not for the court.").

In addition to arguing that it should be allowed to cure the violation by obtaining a compact, the Tribe argues the Chairman violated NIGC regulations by failing to give the Tribe a reasonable time to negotiate and achieve an approved compact. *See* Supp. Stmt at 10. The Chairman asserts that he gave the Tribe ample warning of the violation and opportunity to comply prior to issuance of the NOV. *See* Chairman's Reply to Respondent's Supplemental Statement at 5; Hearing Transcript at 29-30. The Presiding Official found that the "reasonable time" must run from the date of the NOV. *See* Rec. Dec. at 11. We agree with the Presiding Official in this regard and find that the reasonable time period for correction of a violation of IGRA set forth in an NOV begins to run on the date the NOV is issued and served.

NIGC regulations require that the NOV "contain a reasonable time for correction, if the respondent cannot take measures to correct the violation immediately." 25 C.F.R. § 573.3(b)(4). Regarding issuance of a TCO, the regulations provide that an order of temporary closure may issue if the respondent fails to correct a violation "within the time permitted in a notice of violation." 25 C.F.R. § 573.6(a)(1)(i). These regulatory provisions make it clear that the clock begins when the NOV is issued. We recognize that NIGC policy encourages voluntary compliance, and enforcement is a last resort to gain that compliance. In that regard, attempts to gain compliance are favored, and evidence of such is properly included in the agency record. However, those efforts cannot influence the determination as

to what is a "reasonable time for correction" following the issuance of an NOV. We find that "reasonable" relates to how quickly the measure chosen for correction can be practically accomplished, regardless of prior agency attempts to gain compliance.

In this case, we find that three days was a reasonable time to effectuate closure of the casino. The NOV was issued on June 3, 2004, and gave the Tribe until June 7, 2004, to close its operation. When it did not close pursuant to the NOV, the Chairman issued a TCO on June 7, 2004. The Tribe closed its operation on June 8, 2004, a date four days following the issuance of the NOV and one day following issuance of the TCO. By its actions in immediately closing the casino after receipt of the TCO, the Tribe substantiates our finding that three days is a reasonable time to accomplish closure.

Because we find that closure is a permissible remedy and proper in this instance, based on the record before us we need not reach the question whether the enforcement action should be stayed pending the Tribe's attempts to obtain a compact.

The Tribe argues that the NOV and TCO must be stayed pending its good faith efforts to obtain a compact. Because we find that the Chairman was within his discretion to choose closure of the casino as the remedy, we need not reach the question whether the action should be stayed pending the Tribe's attempts to obtain a compact. The achievement of a compact was not the remedy chosen by the Chairman.

Nevertheless, we are compelled to address the Tribe's erroneous reliance on *U.S. v. Spokane Indian Tribe*, 139 F.3d 1297 (9th Cir. 1998), for the proposition that the NIGC cannot take enforcement action against a tribe engaged in non-compacted Class III gaming. *See* Supp. Stmt. at 8. The *Spokane* court did not make such a broad holding. What it found was, "[u]nder the circumstances, IGRA's provisions governing Class III gaming may not be enforced against the [Spokane] Tribe." *Id.* at 1302. The circumstances at issue were that the State of Washington had invoked its Eleventh Amendment right to sovereign immunity[7] and the tribe had applied to the Secretary of the Interior, without success, to prescribe regulations to govern compact negotiations given that the state failed to negotiate.

[7] *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). As to the Tribe at issue in this case, the State of California did not invoke its Eleventh Amendment right.

The circumstances at issue here are distinguishable from those at issue in *Spokane*. The State of California did not invoke the Eleventh Amendment. In fact, the Tribe brought suit against the State for bad faith compact negotiations, and the case was litigated to the U.S. Supreme Court. The Ninth Circuit Court of Appeals ruled against the Tribe, finding that the State had not negotiated in bad faith, *In re Indian Gaming Related Cases*, 331 F.3d 1094 (9th Cir. 2003), and the U.S. Supreme Court denied the Tribe's petition for writ of certioriari. *See Coyote Valley Band of Pomo Indians v. California*, 2004 U.S. LEXIS 1064 (U.S. Feb. 23, 2004).

The Tribe also relies on a Presiding Official's decision to stay enforcement proceedings in *In the Matter of Shoalwater Bay Indian Tribe*, NIGC 99-2, (Order Deferring Decision and Staying Proceedings on Reconsideration Motion) (August 23, 2001). We agree with the Chairman that because Presiding Officials do not issue final decisions, but merely make recommendations to the Commission which it may reject or accept, their decisions have no precedential effect. *See* Chairman's Reply to Respondent's Supplemental Statement (June 29, 2004) at 10. Moreover, we further agree with the Chairman that our decision in *In the Matter of Seminole Nation of Oklahoma*, CFA 00-06, CFA 00-10, (Notice of Decision and Order) (Jan. 7, 2003), is binding precedent. *Id.* In that case, we overturned a Presiding Official's decision to stay proceedings pending a district court ruling in an underlying case. We held:

> It is the policy of the [NIGC] that Temporary Closure and related Civil Fine Assessment actions proceed quickly to ensure that their deterrent effect is not diminished. If the Civil Fine proceedings were to be stayed until the underlying actions were concluded in federal court, any resulting fine would have little or no effect over wrongful conduct. This result would be contrary to the goals, policies, and purposes of IGRA and the Commission.

Id. at ¶ 2. We further agree with the Chairman that "[i]t is simply incomprehensible that an enforcement action be stayed until the Respondent comes into compliance. Such a position simply ignores the purposes of IGRA." See Chairman's Reply to Respondent's Supplemental Statement at 10.

The Chairman has discretion to order a temporary closure of an entire operation for a substantial violation of IGRA. Here, the Chairman acted within his discretion to order the closure of the entire operation. Based on the record before us, we are not persuaded by the Tribe's argument that it should be allowed to proceed with either Class II gaming or uncompacted Class III gaming.

The Tribe appealed the Chairman's issuance of the TCO, contending that it unlawfully prohibits the Tribe from operating Class II gaming. *See* Supp. Stmt at 12-13. The Presiding Official found that "the Chairman can close an entire operation, not just a particular class of gaming." Recommended Decision at 10.[8] We affirm this finding.

> The Indian Gaming Regulatory Act provides that:
>
> The Chairman shall have power to order temporary closure of an Indian game for substantial violation of the provisions of this chapter, of regulations prescribed by the Commission pursuant to this chapter, or of tribal regulations, ordinances, or resolutions approved under section 2710 or 2712 of this title.

25 U.S.C. § 2713 (b)(1). Under the Act, Class III gaming is only lawful on Indian lands if it is "conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State . . . that is in effect." *See* 25 U.S.C. § 2710 (d)(1)(C). A compact "shall take effect **only** when notice of approval by the Secretary of such compact has been published by the Secretary in the Federal Register." *Id.* at (d)(3)(B) (emphasis added). Thus, Class III gaming in the absence of an operative Tribe-State compact is a violation of the Act.

The plain language of NIGC regulations supports our conclusion that the Chairman possesses the discretion to order the closure of an entire gaming operation when a tribe operates Class III games without an operative compact. *See In The Matter of Santee Sioux Tribe of Nebraska*, NOV-96-01, CO-96-01 (Commission Decision) (July 31, 1996) at 11 ("the Chairman has discretion in issuing an order of temporary closure"). Specifically, 25 C.F.R. § 273.6 (a) directs:

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[8] In addition, the Presiding Official was "persuaded that when the Government inspected the Casino on June 7, 2004, most of the games were Class III games" and that the NIGC closed the entire operation because, in part, it "wanted to prevent the Tribe from bringing in games that have not yet been definitively determined to be Class II rather than Class III games." Rec. Dec. at 12. Consequently, the Presiding Official determined that "[t]his is not an unreasonable burden on the Tribe in light of the fact that if it reopens with Class II games it procures in the future, it will be on notice that it will have to purchase games which will pass muster with the NIGC." *Id.*

> the Chairman may issue an order of temporary closure of all or part of an Indian gaming operation if one or more of the following substantial violations are present: . . . (11) A gaming operation operates class III games in the absence of a tribal-state compact that is in effect, in violation of 25 U.S.C. § 2710 (d).

25 C.F.R. § 273.6 (a) (emphasis added).

Courts accord NIGC regulations deference. *See, e.g., Seneca-Cayuga Tribe of Okla.* v. *Nat'l Indian Gaming Comm'n*, 327 F.3d 1019, 1037 (10th Cir. 2003), *cert. denied*, 2004 U.S. LEXIS 1651 (U.S. Mar. 1, 2004); *United States v. 162 Megamania Gambling Devices*, 231 F.3d 713, 718 (10th Cir. 2000) (citing *Chevron , U.S.A., Inc. v. Natural Res. Council, Inc.,* 467 U.S. 837, 842-43 (1984)). And, we rely on the plain language of our regulations to affirm the Presiding Official's finding that the Chairman had the authority to close the entire operation.

Moreover, this precise issue was addressed by the Tenth Circuit Court of Appeals in *United States v. Seminole Nation of Oklahoma*, 321 F.3d 939 (10th Cir. 2002). The Court concluded that "when read as a whole IGRA unambiguously authorizes the NIGC Chairman to order the temporary closure of entire gaming operations." *Id.* at 944-45. In addition, the Court determined that NIGC's regulation, 25 C.F.R. § 573.6, authorizing the Chairman to issue "an order of temporary closure of all or part of a gaming operation" if a tribe violates IGRA, was entitled to deference because it was a reasonable interpretation of the statute, 25 U.S.C. § 2713(b)(1). *Id.* at 94

Further, the Tribe's reliance on the June 4, 2001 closure order in *In the Matter of Santee Sioux Tribe of Nebraska*, CO-96-01, does not support their contention that the TCO in this matter was overbroad because it required the cessation of all gaming, instead of allowing the Tribe to continue operating Class II games. In the *Santee Sioux Tribe* case, the Chairman issued an NOV to the tribe on April 25, 1996 for utilizing Class III games without a compact. *See* Order, CO-96-01 at 1. Subsequently, on May 1, 1996, the Chairman ordered the tribe to close its casino. *Id.* Upon appeal, the Commission affirmed and made permanent the Chairman's closure order on July 31, 1996. *Id.* at 2. Five years later, after ceasing to operate the Class III machines and replacing them with Class II machines, the Santee Sioux Tribe moved to dissolve the Commission's permanent closure order. *Id.* Thus, at that time, the Commission rescinded its permanent closure order in part to allow the tribe to conduct

gaming with the Class II machines. *Id.* at 3. Therefore, contrary to the Tribe's assertion, this case supports the Chairman's authority to close an entire gaming facility for conducting Class III gaming without a compact and in no way bolsters the Tribe's contention that the Chairman was limited to ordering the cessation of Class III gaming for violating IGRA by operating Class III games in the absence of an operative compact.

Here, the Tribe stipulated at the hearing on July 7, 2004 that it was and is conducting Class III gaming at the Shodaki casino and no compact involving the Tribe and the State of California has been published in the Federal Register, as approved by the Secretary. *See* Rec. Dec. at 6, Finding 15. Accordingly, based upon the plain language of our regulation and other authority set forth above, we uphold the Chairman's decision to order the closure of the Tribe's entire gaming operation. Based on the record before us, the Closure Order is made permanent, as "good cause" does not overcome IGRA's requirement that Class III gaming is only authorized when a compact is in effect.

The Tribe contends that good cause exists to rescind the Chairman's TCO pending approval of the Tribe's compact with the State of California and that the Chairman should have rescinded the TCO for good cause under 25 C.F.R. § 573.6 (c)(3). Specifically, the Tribe maintains that during the "compact dispute between California tribes and the State of California, many California tribes were allowed to operate Class III gaming activities without the threat of enforcement of the compact requirement by the Federal government." *See* Supp. Stmt. at 11. In particular, the Tribe asserts that while it pursued its bad faith negotiation litigation against the State, the NIGC did not issue a closure order to it; the U.S. District Court stayed any enforcement against the Tribe's Class III gaming operation; and, as a consequence, good cause must have existed to permit the Tribe to operate Class III gaming while the Tribe's rights were being litigated.[9] *Id.* Thus, the Tribe argues that the same principle should apply now since following the expiration of the U.S. District Court's stay order in the bad faith litigation on March 17, 2004, the Tribe has sought to negotiate a new compact and Secretarial approval of its 1999 compact. *Id.* at 11-12.

As to this issue, the Presiding Official found that "[s]ince the hearing, there is no reason to believe that the Tribe is not diligently pursuing the negotiation of a new Tribal-

[9] The Tribe contends that the U.S. Department of Justice and the NIGC granted the same treatment to other California tribes while their compacts were being negotiated and while the tribes' compacts were awaiting approval by the Secretary. *See* Supp. Stmt at 11.

State Compact" and recommended that the TCO "be suspended unless and until the Tribe fails to secure such a compact and its approvals" by September 3, 2004. *See* Rec. Dec. at 10, 12-13.

First, it is important to distinguish past circumstances from the present. During 1999, the U.S. Department of Justice did not proceed with enforcement actions against tribes that entered into provisional compacts with the State prior to October 13, 1999 to allow the compacts to become effective through ratification by public vote in March 2000. *See* Letter from Alejandro N. Mayorkas, U.S. Attorney, to Counsel of 9/2/99; Supp. Stmt. Exhibit 5. Although the Tribe signed a letter of intent to enter into a compact on September 9, 1999, shortly thereafter, it declined to sign the compact, requesting further negotiations with the State. *See* Rec. Dec. at 3, Findings 5 and 6. When the State refused to negotiate further, the Tribe sued the State for failure to negotiate in good faith. *Id.* at 3, Finding 6. On October 25, 2000, the U.S. District Court issued a stay of enforcement action against the Tribe's Class III gaming operation while the litigation was pending. *See United States v. 384 Electronic Gambling Devices*, 98-cw-1977 (N.D. Cal. Order of October 25, 2000). In regard to the bad faith litigation, the District Court ruled in favor of the State; the Court of Appeals affirmed; on February 23, 2004, the U.S. Supreme Court denied the Tribe's petition for writ of certiorari; and on March 17, 2004, the U.S. District Court's stay order expired. *See Indian Gaming Related Cases v. California*, 147 F. Supp. 2d 1011 (N.D. Cal. 2001), *aff'd*, 331 F.3d 1094 (9th Cir. 2003), *cert. denied*, 124 S.Ct. 1412, 2004 U.S. LEXIS 1064 (U.S. Feb. 23, 2004).

These past circumstances are distinguishable from the present. The NIGC delayed action for many years to allow the Tribe to pursue its bad faith action against the State. *See* Decision Upon Expedited Review, CO-04-01, (June 10, 2004) at 2. At present, the Tribe's Federal court remedies as to its bad faith litigation are exhausted, as the Ninth Circuit Court of Appeals determined that the State negotiated in good faith and the U.S. Supreme Court has refused to hear the case. Class III gaming in the absence of an operative compact is a substantial violation of IGRA. *See* 25 U.S.C. § 2710 (d)(1)(C); 25 C.F.R. § 273.6 (a)(11). A compact is only operative or "in effect" when notice of approval by the Secretary has been published in the Federal Register. *See* 25 U.S.C. § 2710 (d)(3)(B). Therefore, we agree with the Chairman that because the bad faith litigation concluded and because the Tribe does not

have an operative compact, the Tribe's compliance with IGRA is mandatory and must be immediate.[10]

Here, the Tribe requests that the NIGC rescind the TCO so that it may continue negotiations with the State for a compact and approval of that compact by the Secretary.[11] As the Chairman stated in his June 10, 2004 Decision, "[s]imply put, the NIGC cannot allow Tribes to engage in Class III gaming without an approved compact." *See* Decision Upon Expedited Review, *supra* at 2.

The Commission previously addressed this very issue in *In the Matter of Santee Sioux Tribe of Nebraska*, NOV-96-1, CO-96-01 (July 31, 1996) (Final Commission Decision). In that case, the Chairman had issued a NOV and a TCO because the tribe was operating Class III games without a compact. The Santee Sioux Tribe contended that the Chairman should have rescinded his order of temporary closure for "good cause" pursuant to 25 C.F.R. § 573.6 (c)(3). *In the Matter of Santee Sioux Tribe of Nebraska*, *supra* at 13. The "good cause" reasons cited by the tribe were the Governor's failure to negotiate in good faith; the fact that Class III gaming and illegal gaming were rampant in Nebraska; and that Class III gaming was needed on the reservation to combat adverse economic conditions. *Id.* The Commission determined that the closure order should not be rescinded, reasoning that:

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[10] Our analysis is not altered by the fact that the Tribe has now brought suit against the Secretary regarding her June 10, 2004 decision to disapprove the 1999 compact. The Secretary is authorized to approve or disapprove any Tribal-State compact entered into between an Indian Tribe and a State. *See* 25 U.S.C. § 2710 (d)(8). Since the Secretary is charged with this duty, the Secretary's decision to disapprove the compact is owed deference. *See Chevron, U.S.A., Inc. v. Natural Res. Defense Council*, 467 U.S. 837, 842-43(1984); *Cf. Passamaquoddy Tribe v. Maine*, 75 F.3d 784, 794 (1st Cir. 1996). The NIGC cannot continually suspend enforcement of IGRA to the conclusion of the Tribe's lawsuits related to its compact efforts. As the U.S. District Court Judge found in regard to the Tribe:

> an injunction that would allow [the] [sic] Tribe to operate its casino without a compact until the final resolution of this lawsuit [against the Secretary and the NIGC] would undermine the NIGC's authority to enforce IGRA and the State's ability to negotiate and enforce compacts with other tribes. This would offend the public interest.

Coyote Band of Pomo Indians v. Nat'l Indian Gaming Comm'n, No. C 04-2337 CW, slip op. at 16 (N.D. Cal. June 25, 2004) (order granting preliminary injunction).

[11] The Tribe seeks 45 days from the expiration of the Preliminary Injunction, or until October 8, 2004, to negotiate a new compact and obtain the Secretary of the Interior's approval of the compact. *See* Tribe's Objections to the Presiding Official's Recommended Decision (August 9, 2004) at 2-3. As noted in footnote 2, above, the Tribe and the Governor of California have reached agreement on a compact which has not yet been approved by the state legislature and the Secretary of the Interior, and the District Court has extended the Preliminary Injunction pending publication of an approved compact. We recognize that the NIGC is now enjoined from interfering with the Tribe's operation of Class III gaming pending publication of an approved compact. Nevertheless, we reach our decision today based on the record before us.

> **nothing in IGRA suggests that the Chairman and the Commission are to weigh equitable considerations in deciding whether to issue a temporary closure order or whether to make such an order permanent.** It appears the reason for this is that Congress has already conducted the particular 'good cause' analysis which the Tribe asks the Commission to undertake. The legislative history of IGRA shows that Congress was very aware of the oppressive economic conditions on many reservations, and of the benefits that could be realized with the influx of capital generated from gaming. It also shows, however, that Congress believed the states had legitimate concerns about the conduct of class III gaming on Indian lands. **In deciding to require a compact as a prerequisite to authorizing class III gaming, Congress engaged in the precise balancing of equities analysis that the Tribe seeks from the Commission. Congress' conclusion was that, no matter how much good gaming might do for a tribe, class III gaming would not be authorized without a compact.**

In the Matter of Santee Sioux Tribe of Nebraska, supra at 14 (emphasis added). Therefore, the Commission held that "we do not accept the Tribe's argument that it should be excused from compliance with IGRA because it is not possible for it to secure a compact" . . . "it is clear that Congress intended to authorize class III gaming only when a compact was in effect." *Id.* at 15.

Moreover, the Eighth Circuit Court of Appeals determined that "Congress has already balanced the harm of closure against the need for regulatory control." *In re Sac & Fox of the Mississippi in Iowa*, 340 F.3d 749, 761 (8th Cir. 2003). Although discussed in the context of injunctive relief to enforce the Chairman's temporary closure order, the Court's analysis underscores the fact that in crafting IGRA, Congress balanced equities and such balancing is reflected in the Act. The Court explained:

> Congress already declared the public's interest and created a regulatory and enforcement framework that balanced the need for regulation against the harm of closure. . . . Congress viewed effective regulation and respect for regulatory authority as being in the public's interest. . . . Congress desired the Chairman to have the ability to act swiftly and effectively to cure gaming violations . . . Were we to interpret IGRA in a manner that would leave the Chairman unable to enforce a temporary closure order, there would be no need for the congressionally created and balanced system of limited, immediate action followed by administrative or judicial review. We believe, therefore, that the only sensible reading of 25 U.S.C. § 2713 (b)(1) requires that we recognize that Congress already conducted the requisite balancing of the harm of closure against the need for temporary enforcement of the Chairman's closure orders.

In re Sac & Fox of the Mississippi in Iowa, 340 F.3d at 760-61.

In the matter at hand, the Tribe does not have an operative compact. At the hearing on July 7, 2004, the Tribe stipulated that it was and is conducting Class III gaming at the Shodaki casino and no compact involving the Tribe and the State of California has been published in the Federal Register, as approved by the Secretary. *See* Rec. Dec. at 6, Finding 15. Because the Tribe was and is continuing to conduct Class III gaming without an approved compact, the TCO was and is appropriate. Such conduct is a substantial violation of IGRA and must be met with the appropriate enforcement mechanism as set forth in IGRA and NIGC regulations.[12]

Consequently, we reverse the recommendation of the Presiding Official to suspend the TCO until September 3, 2004 and we make the closure order permanent.

In IGRA, Congress balanced the equities between the economic rewards of Class III gaming and the requirement that such rewards be gained in the context of a compact that is in effect. Based on the record before us, the Tribe's argument that equities weigh in their favor to justify Class III gaming without an operative compact does not supercede or prevail over the mandate of IGRA.

The Tribe seeks to have the NOV and TCO vacated on the grounds that the public interest and equities in this matter tilt in their favor. *See* Supp. Stmt at 13. The Tribe claims that promoting tribal economic development, one of the principal goals of IGRA, justifies allowing it to continue operating its Class III games to fund its essential government functions, even in the absence of an operative compact. *Id.* In short, the Tribe maintains that the TCO is devastating to its economy and the functioning of its government. *Id.* at 14-15.

The Presiding Official also acknowledged that Congress enacted IGRA in part because a principal goal of Federal Indian policy is to promote economic development and

[12] The Commission notes that the Tribe was aware of its violation of IGRA prior to the issuance of the NOV on June 4, 2004. The agency record reflects the Chairman's substantial efforts in encouraging the Tribe come into compliance with IGRA prior to the issuance of an NOV. On March 10, 2004, the Chairman sent a letter to the Tribe indicating that he was aware that the Tribe's bad faith litigation had concluded and that he "expect[ed] the Tribe to comply with the Indian Gaming Regulatory Act (IGRA) by removing all Class III gaming devices." *See* Letter from Philip Hogen, Chairman of the NIGC, to Priscilla Hunter, Chairperson of the Coyote Valley Band of Pomo Indians, of 3/10/04; (Agency Record at Tab 11). Further, on March 25, 2004, the Chairman informed the Tribe that it was operating Class III gaming in violation of the IGRA and requested that it cease all such activity by April 30, 2004. *See* Decision Upon Expedited Review, *supra* at 1.

agreed that "maintaining the tribe's economy . . . is a valid reason for exercise of the Commission's discretion" to suspend the TCO. *See* Rec. Dec. at 10.

As detailed above, in enacting IGRA, Congress conducted a balancing of certain equities and concluded that despite the economic benefits of Class III gaming to tribes, such gaming is only permissible when a tribe and a State have an operative compact. *See* 25 U.S.C. § 2710 (d)(1)(c). IGRA's mandate is clear: "Class III gaming activities shall be lawful on Indian lands only if such activities are - . . . conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State . . . that is in effect." *Id.* (emphasis added). As noted above, a compact takes effect only when notice of approval by the Secretary has been published in the Federal Register. *See* 25 U.S.C. § 2710 (d)(3)(B). Thus, Class III gaming without a compact in effect is a violation of the IGRA. And, nothing in the Act indicates that the Chairman or the Commission must weigh equities in determining whether to bring an enforcement action against a violation of the Act or to uphold such action (i.e. that the Tribe's economic necessity overrides the statute's mandate that an operative compact be in existence for Class III gaming). This Commission has previously recognized that the legislative history of IGRA demonstrates that "Congress was very aware of the oppressive economic conditions on many reservations, and of the benefits that could be realized with the influx of capital generated from gaming [. . .; however,] Congress believed the states had legitimate concerns about the conduct of class III gaming on Indian lands [and] . . . Congress' conclusion was that, no matter how much good gaming might do for a tribe, class III gaming would not be authorized without a compact." *In the Matter of Santee Sioux Tribe of Nebraska, supra* at 14; *see also Sac & Fox Tribe of the Mississippi in Iowa v. United States*, 264 F.Supp.2d 830, 840 (N.D. Iowa 2003) ("Any tribe which elects to reap the benefits of gaming authority created by the IGRA must comply with the IGRA's requirements.").

NIGC regulations support this view. In fact, NIGC regulations unequivocally provide that the Chairman may order a TCO of a tribe's gaming operation if a substantial violation is present. *See* 25 C.F.R. § 573.6 (a). A gaming operation utilizing Class III games in the absence of an operative Tribal-State compact constitutes a substantial violation of IGRA. *Id.* at (a)(11). Moreover, nothing in the regulations directs the Chairman and the Commission to weigh equitable considerations in deciding whether to issue a TCO or whether to make such

an order permanent. *See In the Matter of Santee Sioux Tribe of Nebraska, supra* at 14. NIGC regulations should be accorded deference. *See, e.g., Seneca-Cayuga Tribe of Okla.*, 327 F.3d at 1037; *162 Megamania Gambling Devices*, 231 F.3d at 718. We look to the plain language of the Act and the regulations to conclude that operating Class III games in the absence of an operative compact is a substantial violation of IGRA and that the mandate of IGRA cannot be outweighed by the Tribe's equities argument.

This is not to say that the Chairman does not review the equities of a matter prior to initiating an enforcement action against a Tribe, including issuing a closure order, or that the Commission does not review the equities in determining whether to make a closure order permanent. The Chairman has discretion in issuing a TCO and that discretion is akin to "prosecutorial discretion." *See In the Matter of Santee Sioux Tribe of Nebraska, supra* at 11. Whether to terminate an enforcement action already undertaken is similarly committed to the agency's discretion. *Id.* Here, the Chairman took substantial efforts to encourage the Tribe comply with IGRA prior to the issuance of the NOV and TCO.[13] The Tribe chose not to voluntarily comply with the Chairman's requests, flouting the requirements of IGRA.

The Tribe relies on *United States v. Spokane Tribe of Indians*, 139 F.3d 1297 (9th Cir. 1998), to argue that strong public policy supports allowing tribes to sustain their economies by Class III gaming in the absence of a compact and, therefore, IGRA's provisions should not be enforced in this instance. *See* Supp. Stmt at 13. What the Tribe fails to acknowledge, however, is that the circumstances here are the opposite of those in the *Spokane* case. Here, the State of California waived its sovereign immunity and allowed the Tribe to sue it for negotiating in bad faith. That was not the case in the *Spokane* matter, where the State of Washington invoked its sovereign immunity under Eleventh Amendment to dismiss the suit. 139 F.3d at 1301. In fact, even the *Spokane* court found that if a state waived its sovereign immunity and allowed a tribe to sue it, "IGRA would function as exactly as intended and **there would be no reason not to give it full effect.**" *Spokane,* 139 F.3d at 1301 (emphasis added). Moreover, in this instance, the Tribe overlooks the fact that its bad faith litigation

[13] *See* Letter from Philip Hogen, Chairman of the NIGC, to Priscilla Hunter, Chairperson of the Coyote Valley Band of Pomo Indians, of 3/10/04; (Agency Record at Tab 11) (requesting that the Tribe comply with IGRA by removing all Class III gaming devices); Decision Upon Expedited Review, *supra* at 1 (on March 25, 2004, the Chairman once again informed the Tribe that it was operating Class III gaming in violation of the IGRA and requested that it cease all such activity by April 30, 2004).

against the State of California has concluded with the district court holding that the State negotiated in good faith and the Ninth Circuit Court of Appeals affirming that holding. *See In re Indian Gaming Related Cases*, 331 F.3d 1094, 1110 (9th Cir. 2003). Although the NIGC delayed taking enforcement action against the Tribe during the course of its bad faith litigation, that suit is over and the Tribe must comply with the mandate of IGRA and cease gaming without a compact in effect.[14]

Furthermore, compliance with IGRA, effective regulation to ensure such compliance, and respect for regulatory authority is in the public's interest. *See In re Sac & Fox of the Mississippi in Iowa*, 340 F.3d at 760. Through IGRA, Congress devised a regulatory and enforcement framework that balanced the need for regulation against the harm of closure. *Id.* Such framework clearly sets forth the violations of the statute and empowers the NIGC to act to effectively to cure those violations. *See, e.g.*, 25 U.S.C. § 2713 (b). The Commission has found that:

> It is the policy of the [NIGC] that Temporary Closure and related Civil Fine Assessment actions proceed quickly to ensure that their deterrent effect is not diminished. If the Civil Fine Assessment proceedings were to be stayed until the underlying actions were concluded in federal court, any resulting fine would have little or no effect over wrongful conduct. This result would be contrary to the goals, policies, and purposes of IGRA and the Commission.

In the Matter of the Seminole Nation of Oklahoma, CFA 00-06, CFA 00-10 (Notice of Decision and Order of Commission) (Jan. 7, 2003), Finding 2.

In these circumstances, allowing the Tribe to operate Class III games in the absence of an approved compact after the conclusion of its bad faith litigation against the State of California would undermine the NIGC's authority to enforce IGRA and the State's ability to negotiate and enforce compacts with other tribes. *See, e.g., In re Gaming Cases*, 331 F.3d 1094, 1096 (9th Cir. 2003) (quoting *Artichoke Joe's v. Norton*, 216 F.Supp.2d 1084, 1092 (E.D. Cal. 2002)) ("IGRA is an example of 'cooperative federalism' in that it seeks to balance competing sovereign interests of the federal government, state governments, and

[14] Beginning in November 1994, the Tribe began conducting Class III gaming without a Tribal-State compact, and continues to do so. *See In re Gaming Related Cases*, 331 F.3d 1094, 1109 n.6 (9th Cir. 2003). Thus, the Tribe has failed to comply with IGRA for ten years.

Indian tribes, by giving each a role in the regulatory scheme.")[15]; *Sac & Fox Tribe*, 264 F.Supp.2d at 841-42 (finding that refusing to enforce the TCO may encourage tribes nationwide to disregard NIGC enforcement measures, which in turn undermines Indian gaming). "[T]here is a public interest in fostering respect for the law and compliance with administrative procedures [and] [f]ailure to comply with the letter of the law embodied in the IGRA offends public interests." *See Sac & Fox Tribe*, 264 F.Supp.2d at 842. Thus, on the record before us, allowing the Tribe to continue Class III gaming in the absence of an operative compact would be an affront to the public's interest.[16]

Accordingly, we reverse the Presiding Official's recommendation to suspend the TCO and hereby make it permanent.

CONCLUSION

We find that closure of the casino is the appropriate remedy in this instance and, therefore, make permanent the TCO. If there is a relevant or material change of facts or circumstance, which is not now part of the agency record, then the Tribe may petition the Commission to rescind the permanent closure order and request permission to resume Class II and/or Class III gaming.

It is so ordered by the NATIONAL INDIAN GAMING COMMISSION.

Philip N. Hogen	Nelson Westrin	Cloyce V. Choney
Chairman	Commissioner	Commissioner

[15] The compacting process gives to States certain civil regulatory authority that they otherwise would lack, while granting to Tribes the ability to offer legal Class III gaming. *See Artichoke Joe's*, 216 F.Supp.2d at 716.

[16] Even the U.S. District Court articulated the same principle recently in regard to the Tribe:

> an injunction that would allow [the] [sic] Tribe to operate its casino without a compact until the final resolution of this lawsuit [against the Secretary and the NIGC] would undermine the NIGC's authority to enforce IGRA and the State's ability to negotiate and enforce compacts with other tribes. This would offend the public interest.

See Coyote Band of Pomo Indians v. Nat'l Indian Gaming Comm'n, No. C 04-2337 CW, slip op. at 16 (N.D. Cal. June 25, 2004) (order granting preliminary injunction).

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of August, 2004, I served a copy of the foregoing **COMMISSION DECISION** by facsimile and by certified mail, return receipt requested, upon the following:

Priscilla Hunter, Tribal Chairperson (and Agent for Service of Process)
Coyote Valley Band of Pomo Indians
PO Box 39
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Conly J. Shulte, Esq.
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I hereby certify that on the 30th day of August, 2004, I served a copy of the foregoing **Commission Decision** by hand delivery upon the following:

John R. Hay, Esq.
National Indian Gaming Commission
1441 L Street NW, Suite 9100
Washington, D.C. 20005

I also served via United States First Class Mail a true and correct copy of the foregoing instruments to the following addresses:

Candida S. Steel, Presiding Official
U.S. Department of the Interior
Office of Hearings & Appeals
801 N. Quincy St.
Arlington, VA 22203

Dated: 8/30/04

Jerrie L. Moore
Jerrie Moore
Legal Staff Assistant